Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 8, 2018

CLAIM NO. 199861734

CHAD ROGERS PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY, ADMINISTRATIVE LAW JUDGE**

TOYOTA MOTOR MFG.;
WINCHESTER CHIROPRACTIC; AND
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
AND ORDER

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Chad Rogers ("Rogers") appeals from the Opinion, Award and Order rendered February 9, 2018 by Hon. Stephanie L. Kinney, Administrative Law Judge ("ALJ") resolving a medical fee dispute filed by Toyota Motor Mfg. ("Toyota"). The ALJ found compensable ongoing chiropractic

treatment with Dr. Perry Williams, D.C., for Rogers' thoracic spine, but found his cervical and lumbar treatment is non-compensable. Rogers did not file a petition for reconsideration of the ALJ's decision.

On appeal, Rogers argues the ALJ erred in finding his cervical and lumbar chiropractic treatment is not compensable, and a contrary result is compelled. The ALJ's determination is supported by substantial evidence, and a contrary result is not compelled; therefore, we affirm.

Rogers sustained thoracic injuries on September 12, 1997 while working for Toyota. A Form 110-I settlement agreement was approved by Hon. Sheila C. Lowther, Administrative Law Judge on February 19, 2002. The agreement reflects the temporary total disability benefits previously paid to Rogers, along with $23,500.00 for settlement of any claim for permanent partial disability benefits, and $2,000.00 for settlement of any claim for vocational rehabilitation benefits. Rogers' right to future medical benefits remained open subject to KRS 342.020.

Toyota later filed a medical dispute regarding Rogers' ongoing treatment with Methadone, Percocet, Zanaflex, Protonix, trigger point injections, and chiropractic treatment. In support of the dispute, Toyota filed a report prepared by Dr. Russell Travis. In an Opinion and Order

rendered October 18, 2010, Hon. John B. Coleman, Administrative Law Judge, found the treatment with the contested medications and trigger point injections was not reasonable and necessary, and therefore not compensable. He determined Rogers was entitled to continued chiropractic treatment.

Toyota filed another motion to reopen and medical dispute on July 27, 2017, challenging Rogers' continued cervical and lumbar chiropractic treatment. In support of the motion, Toyota filed the June 27, 2017 peer/medical record review report prepared by Dr. David Cox, D.C. Dr. Cox noted Rogers' diagnoses of thoracic intervertebral disc degeneration, thoracic pain, and myalgia. He stated, "I will note the claimant's complaints and treatment also includes his cervical and lumbar regions which are not compensable areas secondary to the 1997 work injury." He found there was no correlation between the 1997 work injury, and treatment for those areas.

The claim was assigned to the ALJ by order dated August 28, 2018. The ALJ conducted a telephonic conference on October 12, 2017. The only issue identified for litigation was Rogers' continued chiropractic treatment. The parties were granted thirty days to submit evidence.

Dr. Williams' narrative report dated November 3, 2017 was submitted into the record. Presumably, Dr. Williams submitted that report. Dr. Williams noted Rogers' inoperable condition is challenging to manage. He stated the treatment administered is the safe, effective way to manage his care. He also stated as follows:

> Also, of incidental note. The mechanics of the spine are such that all 24 vertebral motor units must be checked for biomechanical changes as the condition in Chad's middle back affects the neck, shoulders and lower back. This is why notations occur in his daily treatment notes pertaining to the treatment of the cervical, thoracic and lumbo-pelvic spine. Additionally, you will see notations of the scapula-thoracic joint (shoulder blade), the glenohumeral joint (shoulder joint) as well as the costovertebral joints (ribs). It is impossible to correct and manage the flare-ups of Chad's condition without addressing the dysfunction present in these joints.
>
> In short, it is in my professional opinion that Chad's condition is permanent and inoperable, and that Spinal Manipulative Therapy as performed by a doctor of chiropractic is the best, safest way to manage his condition. And that his care must include his extremity joints and his upper and lower spine to be optimally effective.

Rogers testified at the hearing held December 11, 2017. He is a resident of Winchester, Kentucky. Rogers has treated with Dr. Williams since 2002 or 2004 for adjustments

to his thoracic spine and other areas to relieve his pain. The treatment for his 1997 work injury has included injections, physical therapy, pain pills, and chiropractic treatment. He stopped taking pills for his condition, other than over-the-counter Ibuprofen, in 2014. He testified he no longer has injections which provided only temporary relief.

Rogers stated chiropractic care provides some relief to pain in his mid-back and chest. He stated the pain is primarily below his shoulders, and goes into his chest. He uses ice packs, changes position, and goes to the chiropractor for relief. Rogers testified the frequency of his chiropractic care varies, and it is based upon his activities. He understands the care Dr. Williams provides is to realign the vertebrae to relieve pressure on the nerve roots. He stated he understands his condition is inoperable. He also stated he sometimes has neck or low back pain depending upon the way he sits.

Rogers stated he currently owns and operates a paving company. He primarily performs office duties, or drives to the work locations to check on the crew. However, he occasionally operates equipment or shovels asphalt. He also lives on a farm and raises cattle.

In her decision issued February 9, 2018, the ALJ found as follows:

Plaintiff continues to experience mid low back pain as a result of the work injury which caused a herniated disc pulposus at T5-6 with cord displacement. One[sic] June 7, 2017, Dr. Williams noted complaints of severe mid-back pain, which had improved following treatment. Plaintiff did not schedule standing appointments for his thoracic condition, but opted to follow-up with Dr. Williams on an as-needed basis. Dr. Williams explained chiropractic treatment is the safest way to manage Plaintiff's non-operable condition. Based upon Dr. Williams' treatment notes, Plaintiff has received a benefit as it improves his mid-back symptoms. This treatment helps Plaintiff continue to perform full-time work in conjunction with his paving business. Thus, this ALJ finds continued chiropractic treatment is reasonable and medically necessary for the September 12, 1997 work injury.

This ALJ has considered the opinions of Dr. Cox, who opined Plaintiff's continued symptoms have no causal relationship to a work injury, which occurred twenty (20) years ago. However, it appears Plaintiff's thoracic and mid-back symptoms have persisted since the work injury. Considering the presence of a herniated nucleus pulposus at T5-6, this ALJ finds Dr. Cox's reasoning and causation opinion is flawed. Dr. Cox does not indicate or cite any diagnostic testing which indicates Plaintiff no longer suffers any abnormalities in his thoracic spine.

Dr. Cox noted Plaintiff receives chiropractic treatment to his neck and low back. Plaintiff's neck and low back were not injured as a result of the September 12, 1997 work injury. This ALJ considered Dr. Williams' opinion on this issue, but ultimately was not persuaded.

> As such, this ALJ finds lumbar and cervical chiropractic treatment is not related to the September 12, 1997 work injury. In making this finding, the ALJ relies on the opinions of Dr. Cox.

No petition for reconsideration was filed. Pursuant to KRS 342.285, the absence of a petition for reconsideration means the ALJ's order "shall be conclusive and binding as to all questions of fact," as long as substantial evidence exists in the record supporting the ALJ's conclusion. As the Supreme Court of Kentucky instructed in Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985), if the ALJ's conclusions are supported by substantial evidence in the record, even a "failure to make findings of an essential fact" cannot be reversed and remanded to the ALJ unless that failure was first brought to the attention of the ALJ. Id. at 338.

Consequently, a decision resolving purely factual questions cannot be reversed if substantial evidence supports the ultimate conclusion. However, on questions of law or mixed questions or law and fact, this Board's standard of review is *de novo*. *See* Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). "When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below

were sustained by evidence of probative value." Uninsured Employers' Fund v. Garland, 805 S.W.2d 116 (Ky. 1991). Because a petition for reconsideration was not filed, our review is limited.

In a post-award medical fee dispute, the burden of proof to determine if the medical treatment is unreasonable or unnecessary is with the employer, while the burden remains with the claimant concerning questions pertaining to work-relatedness or causation of the condition. *See* KRS 342.020; Mitee Enterprises vs. Yates, 865 S.W.2d 654 (Ky. 1993); Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997); R.J. Corman Railroad Construction v. Haddix, 864 S.W.2d 915, 918 (Ky. 1993); and National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

Here, the ALJ determined the contested cervical and lumbar chiropractic treatment are not casually related to his 1997 work injury, and therefore are not compensable. Dr. Cox's report supports the ALJ's determination. The ALJ has the right and obligation to determine the compensability of treatment based upon the evidence presented. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *See* Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971); Special

Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). In this instance, the ALJ's determinations are supported by substantial evidence of record and will not be disturbed.

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ has the discretion and sole authority to reject any testimony and believe or disbelieve parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977); Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Here, the ALJ properly considered the evidence of record and applied the correct analysis in reaching her determination. Since substantial evidence supports the ALJ's determination, we must affirm. While Rogers may be able to point to documentation contrary to this determination, a different decision is not compelled. This merely constitutes evidence upon which the ALJ could have relied, but did not.

As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra. Rogers essentially requests this Board to re-weigh the evidence, and substitute its opinion for that of the ALJ, which we cannot do, especially in light of the fact he did not file a petition for reconsideration. Whittaker v. Rowland, supra. Rogers merely points to conflicting evidence supporting a more favorable outcome, which is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Because we determine the ALJ's decision is supported by substantial evidence, a contrary result is not compelled, and additionally because Rogers failed to file a petition for reconsideration, the ALJ's decision must be affirmed.

We also note Rogers has requested oral arguments be held in this claim. Because we determine oral arguments would not assist with rending a decision in this claim, this request is **DENIED.**

Accordingly, the February 19, 2018 Opinion, Award and Order rendered by Hon. Stephanie L. Kinney, Administrative Law Judge, is hereby **AFFIRMED.**

ALL CONCUR.

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MICHAEL W. ALVEY, CHAIRMAN
WORKERS' COMPENSATION BOARD

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